ORIGINAL

No. 93-5256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission of an out-of-court statement by petitioner's accomplice violated the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (Pet. App. 1) is unpublished, but the judgment is noted at 981 F.2d 1262 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1992, and a petition for rehearing was denied on March 24, 1993. Pet. App. 7. On June 16, 1993, Justice Kennedy granted an extension of time to file the petition until July 15, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to possess, and of possessing, cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and of engaging in interstate travel to promote the distribution of cocaine, in violation of 18 U.S.C. 1952. The district court sentenced petitioner to 327 months' imprisonment. The court of appeals affirmed. Pet. App. 1.

1. On March 26, 1989, a deputy sheriff stopped a rental car driven by Reginald Harris. Harris consented to a search of the car, which revealed 19 kilograms of cocaine in luggage in the trunk. Pet. 2. The luggage bore the initials of petitioner's sister, and an envelope addressed to petitioner was in the glove compartment. Id. at 3-4. Petitioner was listed as an additional driver on the car rental agreement, and a parcel post receipt in petitioner's girlfriend's name was also in the glove compartment. Id. at 4.

Harris was arrested, and DEA Agent Donald Walton interviewed Harris twice thereafter. In the first interview -- over the telephone shortly after the arrest -- Harris said that the cocaine belonged to petitioner, and that Harris was to deliver it to a dumpster in Atlanta later that night. Several hours later, Agent Walton spoke to Harris in person. This time Harris related that he had rented the car and had driven it to Fort Lauderdale to meet petitioner. Harris said he obtained the cocaine from a Cuban

acquaintance of petitioner, who had left a note with instructions on how to deliver the cocaine. Pet. 3.

When Agent Walton proposed making a controlled delivery, Harris said he had lied about the Cuban, the note, and the delivery to the dumpster. He said that he had been transporting the cocaine to Atlanta for petitioner, that petitioner had been in another car in front of Harris and had observed the stop of Harris's car and his arrest, and that any controlled delivery would therefore be impossible. Pet. 3.

When he was called to testify at petitioner's trial, Harris invoked his Fifth Amendment privilege against compelled self-incrimination. Although he was given use immunity and ordered to testify, Harris refused to do so. Pet. 2; Gov't C.A. Br. 2, 12. Agent Walton was then permitted to relate the statements Harris had made to him. Walton explained that at the time Harris made his statements, Walton had promised only to report Harris's cooperation to the U.S Attorney; Walton said that he did not promise that Harris would receive any reward or other benefit for cooperating. Gov't C.A. Br. 16.

Tirso Dominguez, an admitted cocaine dealer, testified that he sold petitioner cocaine in 10 to 20 kilogram quantities on five to 10 occasions in late 1987. Dominguez said that on each occasion petitioner had someone transport the cocaine from Miami by car while petitioner traveled in a separate car. Gov't C.A. Br. 6-7.

2. The district court admitted Harris's statements under Federal Rule of Evidence 804(b)(3), as declarations against penal

interest. Pet. App. 6. On appeal, petitioner argued, inter alia that those statements were not admissible under Fed. R. Evid. 804(b)(3) or the Confrontation Clause of the Sixth Amendment. The court of appeals affirmed the conviction without an opinion. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 4-15) that the admission by the courts below of Harris's out-of-court statements violated his rights under the Confrontation Clause.

1. Federal Rule of Evidence 804(b)(3) authorizes the admission of a statement by an unavailable declarant if the statement "so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[1/] The district court admitted Harris's statements under that Rule and thus implicitly found that the statements were made under circumstances that made it unlikely that Harris would lie.

In this Court, petitioner has raised only a Confrontation Clause challenge to the admission of Harris's statements. He has

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1/ The Rule contains a special provision applicable to statements against penal interest that are offered "to exculpate the accused." Those statements are admissible only if, in addition to satisfying the other requirements of the Rule, the proponent satisfies the court that "corroborating circumstances clearly indicate the trustworthiness of the statement." That proviso does not apply here, because Harris's statements were introduced to inculpate, not exculpate the defendant. The Fifth Circuit has misread the Rule to require a clear showing of trustworthiness in all cases in which a statement against penal interest is offered in a criminal case. United States v. Flores, 985 F.2d 770, 774 n.10 (5th Cir. 1993); United States v. Sarmiento-Perez, 633 F.2d 1092, 1101 (5th Cir. 1981).

not challenged the admissibility of those statements under Rule 804(b)(3). Because petitioner has not argued in this Court that the statements made to Agent Walton failed to satisfy the requirements of Rule 804(b)(3), the only question presented for review is whether statements that are found to satisfy the reliability test of that Rule are subject to a second screening under the Confrontation Clause and may be excluded for noncompliance with a separate reliability test derived from Confrontation Clause policies.

In our view, once a statement is found to be admissible under Rule 804(b)(3), its reliability is sufficiently established for Confrontation Clause purposes, and it should not be subject to further screening for compliance with the general policies underlying the Confrontation Clause. This position is simply a specific application of the general principle that, except for the "catch-all" hearsay exceptions, Fed. R. Evid. 803(24) and 804(b)(5), compliance with the established hearsay exceptions in the Federal Rules of Evidence is sufficient to satisfy the Confrontation Clause, and in such cases no additional Confrontation Clause inquiry is required.

1. In Ohio v. Roberts, 448 U.S. 56 (1980), this Court divided hearsay statements into two categories for purpose of Confrontation Clause analysis: those falling within a "firmly rooted" hearsay exception and those not falling within such an exception. As to statements falling into the former category, the Court held that reliability was presumed and that no further Confrontation Clause analysis was required. As to statements falling into the latter

category, the Court held that those statements could still be admitted if their reliability could be demonstrated in particular cases by "particularized guarantees of trustworthiness." Id. at 65-66; see also White v. Illinois, 112 S. Ct. 736, 743 (1992); Idaho v. Wright, 497 U.S. 805, 814-815 (1990).

Petitioner errs in contending that the decision below conflicts with Idaho v. Wright, supra. That decision simply established the appropriate scope of inquiry for determining whether a hearsay statement that fell into the second category defined in Ohio v. Roberts, supra, bore adequate indicia of reliability. This Court required that the reliability of such a statement be demonstrated from the circumstances surrounding the giving of the statement, not from corroborating evidence introduced at trial. Id. at 819. The Eleventh Circuit, however, has declared that statements admissible under Rule 804(b)(3) fall within the first category defined in Ohio v. Roberts; they are admissible under a firmly rooted exception to the hearsay rule. The principles of Idaho v. Wright are therefore not applicable here.

Nor does this case contravene Lee v. Illinois, 476 U.S. 530 (1986). The Court in Lee noted, in effect, that confessions and associated statements inculpating others could not all be rendered admissible simply by characterizing them as "declarations against penal interest." 476 U.S. at 544 n.5. The Court then looked to the circumstances of the statement at issue in that case to determine its reliability. The Court rejected the State's argument that the statement was reliable because the declarant originally

refused to speak to the police, and did so only after being told his accomplice had already implicated him and after she implored him to "share 'the rap.'" 476 U.S. at 544. The declarant had considered testifying against his accomplice, and he had powerful inducements to maximize her criminal responsibility and minimize his own. Id. at 544-545. Moreover, the two accomplices gave conflicting stories of the crime, and the discrepancies went to critical issues in the case, including the division of responsibility for the crime between the two accomplices. Id. at 546.

In this case, unlike in Lee, the district court found that Harris's statements satisfied the requirements of Fed. R. Evid. 804(b)(3) and thus found that the statements were truly against Harris's penal interest and were made under circumstances providing significant guarantees of reliability. Because the district court determined that Harris's statements fell within that rule, the concerns of the Court in Lee not to permit all custodial confessions to be admitted under the broad rubric of "declarations against penal interest" are not implicated here.

3. The courts of appeals generally have held that the hearsay exception for statements against penal interest is a firmly rooted hearsay exception, and that statements found to be admissible under Fed. R. Evid. 804(b)(3) may be admitted without further analysis for trustworthiness. See United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991); United States v. York, 933 F.2d 1343, 1363 (7th Cir.), cert. denied, 112 S. Ct. 321 (1991); United States v.

Seeley, 892 F.2d 1, 2 (1st Cir. 1989); United States v. Katsougrakis, 715 F.2d 769, 775-776 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984); see also United States v. Curry, 977 F.2d 1042, 1055-1056 (7th Cir. 1992) (reaffirming validity of York).

Petitioner argues that these cases conflict with decisions of other courts of appeals. The cases he cites as conflicting, however, do not stand for the proposition that statements satisfying the reliability requirement of Rule 804(b)(3) can nonetheless be excluded under the Confrontation Clause. Most of the cases petitioner cites have simply found, in the particular circumstances involved, that a declarant's statement was not admissible under Rule 804(b)(3), either because it was not sufficiently against his penal interest, or because it did not satisfy the express reliability requirement of the Rule. See, e.g., United States v. Magana-Olvera, 917 F.2d 401, 406-409 (9th Cir. 1990); United States v. Boyce, 849 F.2d 833, 836-837 (3d Cir. 1988); United States v. Johnson, 802 F.2d 1459, 1464-1465 (D.C. Cir. 1986); United States v. Riley, 657 F.2d 1377, 1384-1385 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); United States v. Palumbo, 639 F.2d 123, 127-128 (3d Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Lilley, 581 F.2d 182, 187-188 (8th Cir. 1978).[2/]

2/ Other cases on which petitioner relies do not establish a circuit conflict on this issue, for different reasons. Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985), involved an Ohio rule of evidence; the court of appeals simply followed Ohio law in concluding that the statement in question was not against the declarant's penal interest. See 773 F.2d at 60-61. In Morrison v. Duckworth, 929 F.2d 1180 (7th Cir. 1991), although the Seventh Circuit stated that the co-defendant's confession was not against his penal inter-
(continued...)

In United States v. Flores, 985 F.2d 770, 775 (5th Cir. 1993), the court of appeals held that "a confession by an accomplice inculpating a defendant that is being offered as a declaration against penal interest is not a firmly rooted exception [to the hearsay rule]." That court, however, failed to distinguish clearly between the Rule 804(b)(3) analysis and the Confrontation Clause analysis. Rather than first determining whether an accomplice's confession satisfied the reliability requirement of the Rule -- that the statement was one that a reasonable person would not have made unless he believed it to be true -- the court simply lumped all custodial confessions together and held in effect that a rule admitting all such confessions would not be a "firmly rooted exception" to the hearsay rule. But of course Rule 804(b)(3) is not such a rule: it authorizes the admission of statements against penal interest only if those statements are made under circumstances providing significant guarantees of reliability.

Because the Fifth Circuit in Flores did not distinguish between the reliability requirement of Rule 804(b)(3) and the reliability inquiry dictated by the Confrontation Clause, we think its analysis was flawed. Moreover, the difference in approach between the Fifth Circuit in Flores and other courts in which compliance

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2/(...continued)
est to the extent that it cast blame on the defendant, see 929 F.2d at 1182 n.2, the court of appeals subsequently made clear in United States v. York, 933 F.2d at 1363, that statements inculpating an accomplice may fall within Rule 804(b)(3), and that Rule 804(b)(3) is a firmly rooted hearsay exception. Neither Vincent v. Parke, 942 F.2d 989 (6th Cir. 1991), nor United States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991), involved statements admitted under Rule 804(b)(3).

with Rule 804(b)(3) is deemed sufficient to satisfy the Confrontation Clause is an important issue that may well require this Court's review in an appropriate case. This is not a suitable vehicle for addressing that issue, however, for two related reasons.

First, because the issue of the admissibility of statements such as those at issue in this case is generally viewed as implicating the construction and application of Rule 804(b)(3), the issue should be addressed in a case that raises a question as to the admissibility of the evidence under the Rule as well as the Constitution. Because petitioner raises only the Confrontation Clause issue, it must be taken as a given that Harris's statements were properly admitted under Rule 804(b)(3) and therefore satisfied the reliability inquiry under that Rule. Because the reliability of the statements within the meaning of the Rule is not subject to challenge here, this case presents only an abstract question whether statements that are found reliable to the extent required by the Rule may be found unreliable under the Confrontation Clause. In order for the Court to explore the relationship between Rule 804(b)(3) and the Confrontation Clause, it would be preferable to wait for a case in which the admission of the evidence is challenged under both the Rule and the Constitution.

Second, even though it is reasonable to conclude that the Eleventh Circuit would disagree with the analysis of the Fifth Circuit in Flores, the points of disagreement are difficult to ascertain, because the Eleventh Circuit wrote no opinion in this

case. The absence of any written exposition of the Eleventh Circuit's reasoning makes it difficult to determine just what theory the Eleventh Circuit was applying in concluding that the district court did not commit reversible error in admitting Harris's out-of-court statements. While the absence of an opinion does not always counsel against this Court's exercise of its discretionary review power, we believe that on this difficult evidentiary issue, it would be preferable for the Court to have before it a clear articulation of the lower court's reasoning, both to determine the precise nature of the conflict in approach among the circuits and to aid this Court in its analysis of the evidentiary and constitutional questions involved in the particular case under review.[3/]

3/ In the absence of an opinion, it is impossible to know, for example, if the Eleventh Circuit attached significance to the fact that the government attempted to obtain Harris's testimony by immunizing him, but was unable to obtain his testimony because he continued to refuse to testify even under a grant of immunity. The Fifth Circuit in Flores appeared to attach weight to the fact that the government had it within its power to obtain the declarant's testimony by immunizing him. See 985 F.2d at 783 & n.27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1993

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first-class mail, postage prepaid, this 17th day of SEPTEMBER 1993.

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September 17, 1993